

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 ROBIN R. CROW,
12 Plaintiff,

13 v.

14 CAROLYN W. COLVIN,
15 Commissioner of Social Security,
16 Defendant.
17

NO. CV 12-10179 AGR

**MEMORANDUM OPINION AND
ORDER**

18 Plaintiff Robin R. Crow filed this action on December 4, 2012. (Dkt. No. 3.)
19 Pursuant to 28 U.S.C. § 636(c), the parties consented to proceed before the
20 magistrate judge on December 11, 2012 and January 7, 2013. (Dkt. Nos. 8, 11.)
21 On July 15, 2013, the parties filed a Joint Stipulation ("JS") that addressed the
22 disputed issues. The court has taken the matter under submission without oral
23 argument.

24 Having reviewed the entire file, the court reverses the decision of the
25 Commissioner and remands this matter for proceedings consistent with this
26 opinion for the period beginning February 20, 2011.
27
28

I.

PROCEDURAL BACKGROUND

On February 19, 2008, Crow filed applications for disability insurance benefits and supplemental security income, alleging an onset date of April 21, 2007. Administrative Record ("AR") 21, 134, 257-68. The applications were denied initially and on reconsideration. AR 134, 129-30. Crow requested a hearing before an Administrative Law Judge ("ALJ"). AR 150. On March 26, 2009, Crow appeared at the hearing without an attorney or representative. AR 126. The ALJ continued the hearing to give Crow an opportunity to hire an attorney or representative. *Id.* On July 23, 2009, Crow appeared with an attorney, and the ALJ conducted a hearing at which Crow and a vocational expert ("VE") testified. AR 106-23. On August 11, 2009, the ALJ issued a decision denying benefits. AR 134-39.

On January 21, 2011, the Appeals Counsel granted Crow's request for review of the decision, vacated the decision, and remanded the case for further proceedings. AR 141. On remand, the ALJ was to: (1) obtain additional evidence concerning Crow's impairments; (2) give further consideration to the treating and nontreating source opinions, and explain the weight given to such opinion evidence; (3) further evaluate Crow's mental impairments; (4) evaluate Crow's obesity; (5) evaluate other source opinion; and (6) if warranted, obtain supplemental evidence from a VE to clarify the effect of the assessed limitations on Crow's occupational base. AR 142-43. On August 2, 2011, a different ALJ conducted the hearing on remand at which Crow, a medical expert ("ME"), and a VE testified. AR 42-105. Additional medical evidence was admitted and made part of the record. AR 45, 580-713. On September 22, 2011, the ALJ issued a decision denying benefits. AR 18-36. On October 5, 2012, the Appeals Council denied the request for review. AR 1-5. This action followed.

1 II.

2 **STANDARD OF REVIEW**

3 Pursuant to 42 U.S.C. § 405(g), this court reviews the Commissioner's
 4 decision to deny benefits. The decision will be disturbed only if it is not
 5 supported by substantial evidence, or if it is based upon the application of
 6 improper legal standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995)
 7 (per curiam); *Drouin v. Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

8 “Substantial evidence” means “more than a mere scintilla but less than a
 9 preponderance – it is such relevant evidence that a reasonable mind might
 10 accept as adequate to support the conclusion.” *Moncada*, 60 F.3d at 523. In
 11 determining whether substantial evidence exists to support the Commissioner’s
 12 decision, the court examines the administrative record as a whole, considering
 13 adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the
 14 evidence is susceptible to more than one rational interpretation, the court must
 15 defer to the Commissioner’s decision. *Moncada*, 60 F.3d at 523.

16 III.

17 **DISCUSSION**

18 **A. Disability**

19 A person qualifies as disabled, and thereby eligible for such benefits, “only
 20 if his physical or mental impairment or impairments are of such severity that he is
 21 not only unable to do his previous work but cannot, considering his age,
 22 education, and work experience, engage in any other kind of substantial gainful
 23 work which exists in the national economy.” *Barnhart v. Thomas*, 540 U.S. 20,
 24 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003).

25 **B. The ALJ’s Findings**

26 The ALJ’s findings are divided into the time periods before and after a
 27 February 20, 2011 motor vehicle accident. The ALJ found that Crow met the
 28 insured status requirements through June 30, 2012. AR 23.

1 The ALJ found that, from April 21, 2007 through February 19, 2011, Crow
2 had the following severe impairments: obesity, borderline intellectual functioning,
3 and major depressive disorder. AR 24. She had the residual functional capacity
4 ("RFC") to perform a range of medium work. AR 26. She could exert 20 to 50
5 pounds of force occasionally, 10 to 20 pounds of force frequently, and up to 10
6 pounds of force constantly to move objects. She could sit, stand and walk up to
7 6 hours in an 8-hour workday with normal breaks. She could not climb ladders,
8 ropes or scaffolds; could not balance; and could not be exposed to hazardous
9 machinery, unprotected heights, or other high risk, hazardous or unsafe
10 conditions. Crow was limited to simple, routine and repetitive tasks in a low
11 stress work environment (defined as work requiring no more than occasional
12 changes in work setting, and not requiring unusual, very fast pace or production
13 rate requirements) that did not require more than occasional interaction with the
14 public or coworkers. *Id.* Crow was unable to perform any past relevant work, but
15 she could perform jobs that existed in significant numbers in the national
16 economy, such as surveillance system monitor; cleaner, industrial/janitorial; and
17 cleaner, housekeeping. AR 29-30.

18 During the period beginning February 20, 2011, Crow has the following
19 severe impairments: obesity; borderline intellectual functioning; major
20 depressive disorder; a tibia/fibular fracture; dislocated left talus; and internally
21 deranged right wrist. AR 31. Crow has the RFC to perform a range of light work.
22 *Id.* She can exert 20 pounds of force occasionally and 10 pounds of force
23 frequently to move objects, except that she can lift no more than 10 pounds with
24 her dominant right hand and no more than 20 pounds bilaterally or with her left
25 hand alone. *Id.* She can stand/walk up to 4 hours and sit up to 6 hours in an 8-
26 hour workday with normal breaks. She cannot climb ladders, ropes or scaffolds;
27 balance; be exposed to hazardous machinery, unprotected heights or other high
28 risk, hazardous or unsafe conditions; or have concentrated exposure to extreme

1 cold, extreme heat or extreme vibration. She can occasionally climb ramps or
2 stairs; walk on uneven ground; stoop; kneel; crouch; crawl; and handle and finger
3 objects with her dominant right upper extremity. She can perform simple, routine
4 and repetitive tasks in a low stress work environment (defined as work requiring
5 no more than occasional changes in work setting and no unusual, very fast pace
6 or production rate requirements) that requires only occasional interaction with the
7 public or coworkers. AR 31-32. Beginning February 20, 2011, Crow cannot
8 perform any past relevant work, but is able to perform a significant number of
9 jobs in the national economy such as surveillance system monitor and laboratory
10 sampler. AR 34-35.

11 **C. ALJ's Analysis of the Medical Evidence**

12 **1. Obesity**

13 Crow contends the ALJ failed to properly evaluate obesity pursuant to
14 Social Security Ruling ("SSR") 02-01p,¹ which requires an assessment of her
15 ability to perform routine movement and necessary physical activity within the
16 work environment.

17 The ALJ found that obesity was one of Crow's severe impairments. AR
18 24, 31. "[Crow's] weight, including the impact on her ability to ambulate as well
19 as her other body systems, has been considered within the functional limitations
20 determined herein." AR 24. Crow has not pointed to any evidence in the record
21 of any functional limitations as a result of her obesity that the ALJ failed to
22 consider. See *Burch v. Barnhart*, 400 F.3d 676, 684 (9th Cir. 2005). The court in
23 *Burch* noted an ALJ "'will not make assumptions about the severity or functional
24 effects of obesity combined with other impairments. Obesity in combination with
25

26 ¹ Social Security rulings do not have the force of law. Nevertheless, they
27 "constitute Social Security Administration interpretations of the statute it
28 administers and of its own regulations," and are given deference "unless they are
plainly erroneous or inconsistent with the Act or regulations." *Han v. Bowen*, 882
F.2d 1453, 1457 (9th Cir. 1989).

another impairment may or may not increase the severity or functional limitations of the other impairment.” *Id.* at 682 (citation omitted). Accordingly, an ALJ evaluates a case “based on the information in the case record.” *Id.* (citation and emphasis omitted). Crow has not shown error.

2. Mental Capacity

Crow contends the ALJ mischaracterized the evidence of Crow’s mental status evaluations and failed to mention her Global Assessment of Functioning (“GAF”) score of 49.² Crow also argues the ALJ improperly rejected the opinions of her treating psychiatrist, Dr. Jacobs.

a. Mental Status Evaluations

The ALJ is not required to discuss every piece of evidence on record. *Howard v. Barnhart*, 341 F.3d 1006, 1012 (9th Cir. 2003). Rather, the ALJ need only explain why “significant probative evidence has been rejected.” *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (citation omitted).

The ALJ limited Crow to simple, routine and repetitive tasks in a low stress work environment (defined as work requiring no more than occasional changes in work setting, and not requiring unusual, very fast pace or production rate requirements) that did not require more than occasional interaction with the public or coworkers. AR 26, 31-32.

The ALJ expressly considered the GAF scores of 26, 30, 45 and 55 in the record. AR 28. Crow argues that the ALJ did not consider the GAF score of 49 assessed by a social worker. AR 568. A social worker is not an acceptable medical source. 20 C.F.R. §§ 404.1513(a), (d), 416.913(a)(d). Moreover, the GAF score of 49 falls within the range of 26-55 considered by the ALJ and

² A GAF score of 41-50 indicates “[s]erious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) or any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job). Diagnostic and Statistical Manual of Mental Disorders 34 (4th ed. text rev. 2000).

1 discounted as inconsistent with her longitudinal mental status evaluations.³ AR
2 28. As the ALJ noted, Crow was hospitalized in April 22-27, 2007 with a
3 diagnosis of a brief psychotic disorder. Her GAF ranged from 45 on admission to
4 55 at discharge. AR 28, 573-74. At discharge, she was stable, calm, coherent,
5 on medication and free of paranoia. AR 574. On April 1, 2008, the social worker
6 found that Crow's eye contact was normal, her speech was unimpaired, her
7 motor activity was calm and her interactional style was culturally appropriate and
8 guarded/suspicious. Although Crow points out that her mood was dysphoric and
9 her affect was constricted, the social worker noted that Crow had no perceptual
10 or thought content disturbances. Her associations were unimpaired, her
11 concentration was intact, her judgment was intact and her insight was adequate.
12 AR 567. The ALJ's interpretation of the social worker's evaluation was eminently
13 rational. See *Moncada*, 60 F.3d at 523.

14 One year later, on May 30, 2008, Dr. Riahinejad conducted a complete
15 psychological testing and evaluation. AR 28, 516-22. Dr. Riahinejad assessed
16 borderline intellectual functioning based on Crow's scores of 72-75 on the
17 Wechsler Adult Intelligence tests. AR 519. Crow was pleasant and cooperative,
18 and her thoughts appeared organized. Her immediate memory, concentration
19 and attention span were fair. AR 28, 518. Dr. Riahinejad assessed a GAF score
20 of 60. AR 520. He opined that Crow was cable of understanding, remembering
21 and carrying out simple repetitive instructions. He noted that her pace is "slightly
22 slow" and she "might have difficulty in fast-paced types of positions." *Id.*
23 Although Crow argues the ALJ did not expressly repeat Dr. Riahinejad's
24 observations that Crow appeared "slightly sedated" and exhibited evidence of
25 psychomotor slowing and subdued affect, the ALJ adopted Dr. Riahinejad's

26
27 ³ See *McFarland v. Astrue*, 288 Fed. Appx. 357, 359 (9th Cir. 2008) (citing
28 65 Fed. Reg. 50,745, 50,764-65 (Aug. 21, 2000)) ("[t]he Commissioner has
determined the GAF scale 'does not have a direct correlation to the severity
requirements in [the Social Security Administration's] mental disorder listings.'").

1 functional limitation that Crow would have difficulty with fast paced work due to
2 her slow pace. AR 26, 31-32, 520. The ALJ excluded work that required
3 unusual, very fast pace of production rate requirements such as high hourly
4 quotas or constantly moving assembly lines. AR 26, 31-32.

5 As the ALJ noted, Crow's IQ scores on May 20, 2011 were in the range of
6 borderline intellectual functioning. AR 26, 688. Dr. Izzi noted that Crow had
7 good perceptual motor integration functioning based on the Bender Gestalt Test.
8 The Trail-Making Test indicated a mild degree of impairment. The achievement
9 tests indicated no learning disability. Crow had 11th grade reading skills and 8th
10 grade math and spelling skills. Crow had a deficit in short term visual memory.
11 AR 689. Dr. Izzi opined that Crow could understand, remember and carry out
12 simple instructions, and had a moderate impairment in her ability to interact with
13 the public and coworkers. AR 693-94. The ALJ's RFC took these functional
14 limitations into account.

15 A mental status evaluation in March 2011 also noted that Crow had fair
16 memory, concentration and attention span. Her mood was appropriate, and her
17 judgment, insight and impulse control were fair and appropriate. AR 612. Dr.
18 Mangasep assessed a GAF score of 60. *Id.*

19 Crow has not shown that the ALJ erred in interpreting her mental status
20 evaluations.

21 b. Dr. Jacobs

22 An opinion of a treating physician is given more weight than the opinion of
23 non-treating physicians. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). To
24 reject an uncontradicted opinion of a medically acceptable treating source, an
25 ALJ must state clear and convincing reasons that are supported by substantial
26 evidence. *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005). When a
27 treating physician's opinion is contradicted by another doctor, "the ALJ may not
28 reject this opinion without providing specific and legitimate reasons supported by

1 substantial evidence in the record. This can be done by setting out a detailed
2 and thorough summary of the facts and conflicting clinical evidence, stating his
3 interpretation thereof, and making findings.” *Orn*, 495 F.3d at 632 (citations and
4 quotation marks omitted). “When there is conflicting medical evidence, the
5 Secretary must determine credibility and resolve the conflict.” *Thomas v.*
6 *Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002) (citation and quotation marks
7 omitted).

8 Dr. Jacobs completed a Mental RFC Questionnaire dated April 14, 2009
9 (“Questionnaire”), a Claim for Disability Insurance Benefits – Doctor’s Certificate,
10 dated February 13, 2009 (“Doctor’s Certificate”) and progress notes dated April
11 1, 2008 through March 18, 2009. AR 545-71.

12 In the Questionnaire, Dr. Jacobs stated that he had seen Crow every one
13 to three months since April 1, 2008. AR 546. He diagnosed depressive disorder
14 NOS, anxiety disorder NOS and R/O delusional D/V. He assessed a GAF score
15 of 47. AR 546, 554. Dr. Jacobs found that Crow was limited but satisfactory in
16 the areas of understanding, remembering and carrying out simple instructions.
17 AR 548.

18 Dr. Jacobs opined that Crow was unable to meet competitive standards in
19 the areas of: maintaining attention for two hour segments; sustaining an ordinary
20 routine without special supervision; working in coordination with or proximity to
21 others without being unduly distracted; completing a normal workday and
22 workweek without interruptions from psychologically based symptoms;
23 performing at a consistent pace without an unreasonable number and length of
24 rest periods; accepting instructions and responding appropriately to criticism from
25 supervisors; dealing with normal work stress; understanding, remembering and
26 carrying out detailed instructions; and maintaining socially appropriate behavior.
27 AR 548-49.

1 Dr. Jacobs found that Crow was seriously limited, but not precluded, in the
2 areas of remembering work-like procedures, maintaining regular attendance and
3 being punctual, making simple work-related decisions, asking simple questions
4 or requesting assistance, getting along with co-workers or peers without unduly
5 distracting them or exhibiting behavioral extremes, responding appropriately to
6 changes in a routine work setting, being aware of normal hazards and taking
7 appropriate precautions, setting realistic goals or making plans independently of
8 others, and interacting appropriately with the general public. AR 548-49.

9 In response to a question asking for explanation and supporting clinical
10 findings for his limitations on unskilled work, Dr. Jacobs wrote: "Recurrent
11 symptoms on job (i.e., depression, anxiety and paranoia) noticed by supervisor
12 and customer complaints." AR 548. In response to a similar question regarding
13 semiskilled and skilled work, Dr. Jacobs responded: "[Crow] is too distracted by
14 symptoms and life stressors to effectively function within work environment." AR
15 549. Dr. Jacobs indicated Crow would be absent from work about four days per
16 month due to her impairments. AR 550.

17 In the Doctor's Certificate, Dr. Jacobs indicated Crow was incapable of
18 performing her regular or customary work beginning on December 16, 2008. AR
19 554. Dr. Jacobs anticipated releasing Crow to return to her regular or customary
20 work on September 1, 2009. *Id.*

21 The ALJ gave "some weight" to the Doctor's Certificate stating that Crow
22 was incapable of returning to her regular or customary work. AR 29. The ALJ
23 found that Crow could not perform any past relevant work. AR 29, 34-35.

24 However, the ALJ rejected the Questionnaire because it "appears to have
25 been completed as an accommodation to the claimant and includes only
26 conclusions regarding functional limitations with the only rationale for those
27 conclusions being the claimant's subjective complaints." AR 29. The
28

1 questionnaire had “no probative value because the objective medical evidence
2 does not support it.” *Id.*

3 The ALJ's rejection of Dr. Jacobs' questionnaire is supported by
4 substantial evidence. In response to questions asking for explanation and
5 supporting clinical findings, Dr. Jacobs did not cite any clinical testing or findings
6 to support his limitations. A progress note dated February 11, 2009, indicates
7 that Crow reported losing two jobs due to customer complaints and stated her
8 supervisor noticed her distress and recurrent panic attacks. AR 557. The ALJ
9 could reasonably infer that Dr. Jacobs' rationale reflected Crow's representations
10 to him. An ALJ may draw reasonable inferences logically flowing from the
11 record. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982). An ALJ may
12 reject a treating physician's opinion that is conclusory and inadequately
13 supported by clinical findings. *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d
14 1219, 1228 (9th Cir. 2009); *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d
15 1190, 1195 (9th Cir. 2004). As discussed above, Dr. Jacobs' extreme limitations
16 were not supported by the other objective mental health evidence in the record.
17 Crow has not shown error.

18 **3. Physical Capacity in the Period Beginning February 20, 2011**

19 As of February 2011, Crow was studying to become a pharmacy
20 technician. AR 591, 598. While driving, Crow lost consciousness and drove into
21 a pole at approximately 35 miles per hour. AR 642. Apparently, she was not
22 wearing a seat belt. AR 646. She had a four-inch laceration with internal
23 deformity in the right wrist. She had an open fracture dislocation of the left ankle
24 with bone exposed. AR 643-44. A few days later, she developed pain and
25 swelling in the right ankle. AR 624. An MRI revealed no fractures and the
26 assessment was right ankle sprain. AR 622. After discharge, Crow was briefly
27 hospitalized again on March 26-27, 2011, after she developed pulmonary
28 embolic disease in the right lower lobe arteries. AR 590.

1 For purposes of the benefits at issue, the term “disability” means the
2 inability to engage in any substantial gainful activity by reason of any medically
3 determinable physical or mental impairment “which can be expected to result in
4 death or which has lasted or can be expected to last for a continuous period of
5 not less than 12 months.” 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1509;
6 *Barnhart v. Walton*, 535 U.S. 212, 217-22, 122 S. Ct. 1265, 152 L. Ed. 2d 330
7 (2002).

8 The claimant bears the burden of establishing the duration requirement.
9 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir. 1995). In *Roberts*, the claimant
10 presented evidence that she met a listed impairment for seven months as of the
11 date of the hearing before the ALJ. The court noted that judicial review is limited
12 to the record as it existed before the ALJ when he rendered his decision. If the
13 claimant in fact met the listed impairment for the required twelve months, the
14 claimant was free to file a new claim. *Id.* at 182-83 & n. 3.

15 An examining physician’s opinion constitutes substantial evidence when,
16 as here, it is based on independent clinical findings. *Orn*, 495 F.3d at 632.

17 “The opinion of a nonexamining physician cannot by itself constitute
18 substantial evidence that justifies the rejection of the opinion of either an
19 examining physician or a treating physician.” *Ryan v. Comm’r*, 528 F.3d 1194,
20 1202 (9th Cir. 2008) (citation omitted) (emphasis omitted). However, a
21 non-examining physician’s opinion may serve as substantial evidence when it is
22 supported by other evidence in the record and is consistent with it. *Andrews v.*
23 *Shalala*, 53 F.3d 1035, 1041 (9th Cir. 1995).

24 The ALJ gave great weight to the opinion of Dr. Taylor, an examining
25 physician, and stated that she “assessed functional limitations that are essentially
26 the same as those included in the residual functional capacity assessment
27 herein.” AR 34. This statement is incorrect in one material respect.
28

1 Dr. Taylor conducted an internal medicine evaluation on May 24, 2011.
2 AR 33, 675. Dr. Taylor observed that Crow ambulates slowly using a walker and
3 wearing an orthopedic shoe and brace over her left foot and ankle. AR 677-78.
4 Crow could not perform a tandem walk and could not stand unassisted without a
5 walker. AR 678. Dr. Taylor opined that Crow needs a walker at all times for
6 support due to the recent fracture of the left foot. AR 679. Crow could lift and
7 carry no more than 10 pounds occasionally and frequently; walk and stand no
8 more than 4 hours out of an 8-hour day; occasionally bend, stoop and pull; and
9 occasionally could perform gross handling and fine fingering with the right hand.
10 Crow could not climb, kneel, balance, or crawl; operate moving machinery or
11 drive due to seizures; or be exposed to vibration due to joint pain. AR 33, 679.
12 Dr. Taylor suggested that Crow be reevaluated in one year since it was “unclear
13 what her future recovery will be.”⁴ AR 678.

14 Dr. Taylor’s opinion that Crow needs a walker is not included in the ALJ’s
15 RFC assessment. Although the Commissioner argues that the ALJ must have
16 given more weight to the opinion of the medical expert, Dr. Jensen, the ALJ’s
17 decision actually states that Dr. Taylor’s assessment is “essentially the same” as
18 the ALJ’s RFC, which is not the case.⁵ AR 34.

19 Remand is appropriate for the ALJ to reevaluate Dr. Taylor’s opinion that
20 Crow cannot ambulate on her own.
21
22

23 ⁴ As of June 11, 2011, Crow’s treatment records indicate she was still
24 using a walker. AR 702. At the hearing on August 2, 2011, Crow testified that
25 she was told not to walk at all until a week before the hearing. AR 48. After she
walks around for about half an hour, her feet “swell up like footballs.” AR 47-48.
She walks dragging her left foot and without putting weight on it. AR 51.

26 ⁵ Crow also argues that Dr. Jensen’s opinion was ambiguous because he
27 testified that he did not see impairments that would extend “more than 12
28 months.” AR 57. When asked whether the impairments in ambulation would still
be present “after 12 months,” Dr. Jensen responded: “That would still be very,
very difficult to opine, Your Honor.” AR 58.

1 **D. Credibility**

2 Crow contends the ALJ failed to provide specific, clear and convincing reasons
3 to reject her subjective testimony.

4 “To determine whether a claimant’s testimony regarding subjective pain or
5 symptoms is credible, an ALJ must engage in a two-step analysis.” *Lingenfelter*
6 *v. Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007). At step one, “the ALJ must
7 determine whether the claimant has presented objective medical evidence of an
8 underlying impairment ‘which could reasonably be expected to produce the pain
9 or other symptoms alleged.’” *Id.* (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 344
10 (9th Cir. 1991) (en banc)). The ALJ found that Crow’s medically determinable
11 impairments could reasonably be expected to produce some of the alleged
12 symptoms. AR 27, 32.

13 “Second, if the claimant meets this first test, and there is no evidence of
14 malingering, the ALJ can reject the claimant’s testimony about the severity of her
15 symptoms only by offering specific, clear and convincing reasons for doing so.”
16 *Lingenfelter*, 504 F.3d at 1036 (citation and quotation marks omitted). “In making
17 a credibility determination, the ALJ ‘must specifically identify what testimony is
18 credible and what testimony undermines the claimant’s complaints[.]’” *Greger v.*
19 *Barnhart*, 464 F.3d 968, 972 (9th Cir. 2006) (citation omitted).

20 In weighing credibility, the ALJ may consider factors including: the nature,
21 location, onset, duration, frequency, radiation, and intensity of any pain;
22 precipitating and aggravating factors (e.g., movement, activity, environmental
23 conditions); type, dosage, effectiveness, and adverse side effects of any pain
24 medication; treatment, other than medication, for relief of pain; functional
25 restrictions; the claimant’s daily activities; and “ordinary techniques of credibility
26 evaluation.” *Bunnell*, 947 F.2d at 346 (citing SSR 88-13) (quotation marks
27 omitted). The ALJ may consider (a) inconsistencies or discrepancies in a
28 claimant’s statements; (b) inconsistencies between a claimant’s statements and

1 activities; (c) exaggerated complaints; and (d) an unexplained failure to seek
2 treatment. *Thomas*, 278 F.3d at 958-59.

3 The ALJ found that Crow's statements concerning the intensity,
4 persistence and limiting effects of his symptoms were not credible to the extent
5 they were inconsistent with the RFC. AR 27, 32. The ALJ relied primarily on two
6 reasons: (1) inconsistencies with Crow's daily activities; and (2) lack of
7 supporting objective evidence. AR 27, 29, 32, 34.

8 The ALJ's credibility finding is not supported by substantial evidence
9 during the period beginning February 20, 2011. An ALJ may consider the
10 claimant's daily activities as one factor in weighing credibility. *Tommasetti v.*
11 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008). The ALJ found that, during the
12 period beginning February 20, 2011, Crow "has engaged in a somewhat normal
13 level of daily activity and interaction, . . . including cooking and bathing." AR 32.
14 The ALJ found that the physical and mental capabilities and social interactions
15 required in order to perform Crow's daily activities were the same as those
16 necessary for obtaining and maintaining employment. *Id.* This finding is
17 unsupported. At the August 2, 2011 hearing, as discussed above, Crow testified
18 that she was told by doctors not to walk until just before the hearing. As of the
19 hearing date, Crow drags her left foot without putting weight on it, and she can
20 make it from the bedroom to the bathroom. AR 51. After she walks around for
21 about half an hour, her feet "swell up like footballs" and she waits until the next
22 day for the swelling to go down. AR 47-48. She was told not to stand on her foot
23 and cannot do so for two hours. AR 76. She lost her driver's license due to her
24 seizure history. AR 63. She is unable to finish her training as a pharmacy
25 technician due to her injuries from the car accident, and she has exceeded the
26 four-month leave of absence allowed by the school. AR 72. Crow testified that
27 she "can take a shower and clean up after [herself]." AR 78. A couple of days a
28 week, she "might make some scrambled eggs or something," but she can no

1 longer cook or clean. Her stepmom and nephew do that. *Id.* This level of
2 activity does not support a finding that she has the ability to perform full-time
3 work. See *Lewis v. Apfel*, 236 F.3d 503, 517 (9th Cir. 2001) (claimant's limited
4 activities did not constitute convincing evidence that he could function regularly in
5 a work setting).

6 The remaining reason for discounting Crow's subjective testimony – lack of
7 supporting objective medical evidence – cannot form the sole basis for
8 discounting pain testimony. See *Burch*, 400 F.3d at 681 (“Although lack of
9 medical evidence cannot form the sole basis for discounting pain testimony, it is
10 a factor that the ALJ can consider in his credibility analysis.”). On remand, the
11 ALJ should reevaluate Crow's credibility during the period beginning February
12 20, 2011.

13 **E. Vocational Expert Testimony**

14 Crow contends the ALJ erred in relying on the VE's testimony because the
15 VE's testimony conflicted with the Dictionary of Occupational Titles (“DOT”).⁶

16 “[A]n ALJ may [not] rely on a vocational expert's testimony regarding the
17 requirements of a particular job without first inquiring whether the testimony
18 conflicts with the Dictionary of Occupational Titles.” *Massachi v. Astrue*, 486
19 F.3d 1149, 1152 (9th Cir. 2007); see also *Bray v. Comm'r of Soc. Sec. Admin.*,
20 554 F.3d 1219, 1234 (9th Cir. 2009). SSR 00-4p requires the ALJ to “first
21 determine whether a conflict exists” between the DOT and the vocational expert's
22 testimony, and “then determine whether the [VE's] explanation for the conflict is
23 reasonable and whether a basis exists for relying on the expert rather than the
24 [DOT].” *Massachi*, 486 F.3d at 1153.

25 In evaluating the VE's explanation for the conflict, “an ALJ may rely on
26 expert testimony which contradicts the DOT, but only insofar as the record

27 ⁶ The DOT raises a rebuttable presumption as to job classification.
28 *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995).

1 contains persuasive evidence to support the deviation.” *Johnson*, 60 F.3d at
2 1435. The ALJ’s explanation is satisfactory if the ALJ’s factual findings support a
3 deviation from the DOT and “persuasive testimony of available job categories”
4 matches “the specific requirements of a designated occupation with the specific
5 abilities and limitations of the claimant.” *Id.* at 1435. Remand may not be
6 necessary if the procedural error is harmless, i.e., when there is no conflict or if
7 the VE provided sufficient support for her conclusion to justify any potential
8 conflicts. *Massachi*, 486 F.3d at 1154 n.19.

9 The VE testified that a person with Crow’s RFC after the February 20,
10 2011 accident could not perform Crow’s past relevant work, but could perform
11 the jobs of surveillance system monitor and laboratory sampler. AR 35, 92, 95,
12 98. The VE testified that her testimony did not conflict with the DOT except when
13 she testified about work as it was actually performed. AR 104.

14 Because this matter is being remanded so that the ALJ can reconsider the
15 physical RFC in light of Dr. Taylor’s opinion and Crow’s testimony, the ALJ may
16 reconsider the vocational expert testimony as well.

17 **IV.**

18 **ORDER**

19 IT IS HEREBY ORDERED that the decision of the Commissioner is
20 reversed and the matter remanded for further proceedings consistent with this
21 opinion for the period beginning February 20, 2011.

22 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of
23 this Order and the Judgment herein on all parties or their counsel.

24
25
26 DATED: January 10, 2014



ALICIA G. ROSENBERG
United States Magistrate Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28